

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-303 ✓

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Hazelton and
Williamsport, Pennsylvania
in the Wilkes-Barre-Scranton,
Pennsylvania Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 8, 1993; Released: December 21, 1993

Comment Date: January 18, 1994

Reply Comment Date: February 2, 1994

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed August 3, 1993, by Diversified Communications, the licensee of television station WYOU(TV), Scranton, The New York Times Company, licensee of television station WNEP-TV, Scranton, and WBRE Associates, licensee of television station WBRE-TV, Wilkes-Barre, Pennsylvania, (collectively "Petitioners"), to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the communities of Hazelton and Williamsport, Pennsylvania, to the Wilkes-Barre-Scranton, Pennsylvania television market. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).¹

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of

the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."²

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),³ which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. According to the petitioners, the Wilkes-Barre-Scranton television market includes commercial stations WYOU(TV), Channel 22 (CBS); WNEP-TV, Channel 16 (ABC); and WOLF-TV, Channel 38 (Fox), Scranton;⁴ WBRE-TV, Channel 28 (NBC), Wilkes-Barre; WWLF(TV), Channel 56, Hazelton; and WILF-TV, Channel 53, Williamsport, Pennsylvania.⁵ Both the Hazelton and Williamsport stations operate as satellite stations of WOLF-TV. The petitioners further state that their stations all provide Grade A signal-strength service to Hazelton, and,

¹ The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

² *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting*

Company, Inc., 8 FCC Rcd 94, 95 (1993).

³ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁴ The petitioners report that there is also an outstanding construction permit for Channel 64 in Scranton.

⁵ The petitioners also note that Channel 20 is allocated to Williamsport, although a station on that channel is not operating. However, they state that economic reality dictates that "any station in Williamsport must have Williamsport added as a designated community in the . . . market in order to have any chance for success."

although Williamsport is encompassed by the Grade B signal contours of WYOU and WBRE-TV, but falls "slightly beyond" the Grade B signal of WNEP-TV, all three stations operate translators which provide "strong off-air service" to Williamsport. They further note that the Grade B signal contours of the Hazelton and Williamsport stations substantially overlap with those of the other market-area stations. They maintain that WYOU, WNEP-TV and WBRE-TV "provide virtually all off-air viewing and a preponderance of cable viewing in Hazelton and Williamsport."

6. The petitioners maintain that substantial portions of the area comprising the subject ADI are beyond the composite 35-mile zones centered on Scranton and Wilkes-Barre. Thus, they assert, while commercial stations licensed to communities within the market have "must-carry" status in the ADI (which includes Luzerne and Lycoming Counties where Hazelton and Williamsport are situated), the petitioners' stations may be considered "distant signals" for copyright purposes in at least some of these areas.⁶ The petitioners argue that amendment of Section 76.51 to include both Hazelton and Williamsport as designated communities in the Wilkes-Barre-Scranton market is necessary to ensure that the 1992 Cable Act's must-carry provisions, which rely on ADIs in order to reflect true marketplace conditions, function as anticipated. "Otherwise, a substantial number of cable subscribers within the market may be unable to view the local stations because potential copyright liability will make their carriage unattractive and prohibitively expensive."

7. The petitioners also allege that the factors previously considered by the Commission in evaluating proposed amendments to Section 76.51 of the Rules justify the action requested here. In this regard, they state that Hazelton is 20 air miles from Wilkes-Barre and 35 air miles from Scranton; Williamsport is 59 air miles from Wilkes-Barre and 71 air miles from Scranton -- distances within the range previously considered favorably by the Commission in such cases. The petitioners contend that the stations would not be granted significantly expanded cable carriage rights beyond their Grade B signal contours,⁷ but also contend that this factor is "seriously eroded" by the 1992 Cable Act's must-carry rules. Specifically, they allege that because these stations' must-carry rights are derived from their location in the Wilkes-Barre-Scranton ADI -- not from the proposed hyphenation -- the addition of Hazelton

and Williamsport as designated communities in Section 76.51 of the Rules will not increase the stations' carriage rights beyond that which the Rules already permit.

8. The petitioners further assert that their stations serve the needs and interests of the viewers of Northeastern and Central Pennsylvania (encompassing Hazelton and Williamsport). They point out that television viewing in Hazelton and Williamsport is dominated by the Wilkes-Barre-Scranton stations,⁸ and focus much of their local news coverage on events relevant to those areas. They note that WYOU maintains news bureaus in both Luzerne and Lycoming Counties; airs, on its Williamsport low-power station, twice-daily newsbreaks focusing solely on events in the Williamsport community; and regularly airs live reports from Hazelton and Williamsport on news, sports and other events. They state that WNEP-TV and WBRE-TV also provide extensive news coverage of both Hazelton and Williamsport, with the latter station maintaining a Williamsport News Bureau, with a two-person, full-time staff and dedicated microwave link to its main studio. The petitioners allege that this type of coverage reflects the common ties among the four communities, which are part of the same Congressional District and are historically linked by the local mining and lumber industries. The petitioners believe that these facts demonstrate that all market stations are interdependent on all four market communities for viewers and economic support. Amendment of Section 76.51, in their view, will remove any copyright constraints that might otherwise inhibit carriage of market stations throughout the ADI, placing all market-area stations on an equal competitive footing for cable access throughout the ADI in a manner consistent with both the Commission's approach to market hyphenations and the 1992 Cable Act's reliance on ADIs to be reflective of true market conditions.

DISCUSSION

9. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Wilkes-Barre, Scranton, Hazelton and Williamsport do compete for audiences and advertisers throughout much, if not all, of the proposed combined market area, and that sufficient evidence has

⁶ Stations licensed to communities specifically designated in Section 76.51 of the Rules are generally considered "local signals" for copyright purposes for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Hazelton and Williamsport as designated communities in this market generally results in the petitioners' stations being classified as "distant signals" for market-area systems more than 35 miles from Scranton and Wilkes-Barre, the designated communities in this market as listed in Section 76.51. The addition of Hazelton and Williamsport as designated communities in this market would therefore essentially entitle petitioners' stations to additional "local signal" status for market-area cable systems within 35 miles of those communities. Moreover, under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased

copyright liability. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

⁷ The petitioners assert that the fact that Williamsport falls slightly outside the Grade B signal contour of WNEP-TV is not significant. Citing the Commission's *Report and Order* in MM Docket No. 84-111 (Melbourne and Cocoa, Florida), 57 RR 2d 685, 691 (1985), the petitioners state that the Commission has previously recognized "that portions of a single television market are occasionally located beyond the Grade B contours of some market stations." Moreover, these petitioners point out that each station employs translators and low-power stations to increase coverage to the Hazelton and Williamsport areas.

⁸ The petitioners submit that Arbitron surveys reveal the "indisputable television market connection" between the subject communities, with market stations obtaining a 99% viewing share in non-cable homes and a 70% viewing share in cable homes in Luzerne County (where Hazelton is located), and a 94% share in non-cable homes and 59% share in cable homes in Lycoming County (where Williamsport is located).

been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole.⁹ Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 18, 1994**, and reply comments on or before **February 2, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

⁹ In this regard, we note that the Hazelton and Williamsport stations are presently operating as satellites of WOLF-TV, Scranton and that, to some degree, the petitioners rely on low-power and translator stations to demonstrate service to these communities. Due to the secondary nature of low-power and translator service, these factors of themselves are not necessarily a conclusive indication of service provided to a particular community. However, the Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a market adjustment because each case

will be unique to the individual factual situation presented. See *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977. Accordingly, our conclusion to proceed to a proposed rulemaking in this case is based on the totality of factors which tend to indicate that stations in the Wilkes-Barre-Scranton market are genuinely competitive with one another throughout the combined service area. Nevertheless, interested parties are free to direct comment to this aspect of the particular factual situation presented here.